

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.P., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

N.P.,

Defendant and Appellant.

E054232

(Super.Ct.No. JUV096970)

OPINION

APPEAL from the Superior Court of Riverside County. Michael J. Rushton,
Judge. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and
Appellant N.P.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel,
for Plaintiff and Respondent.

N.P. (Mother) appeals from an order terminating her parental rights concerning her daughter, S.P., pursuant to Welfare and Institutions Code¹ section 366.26. Mother contends the court abused its discretion in denying her section 388 petition and then erred in failing to apply the beneficial parental relationship exception to adoption under section 366.26, subdivision (c)(1)(B)(i). We affirm the order.

I. PROCEDURAL BACKGROUND AND FACTS

On September 15, 2009, a section 300, subdivisions (b) and (g), petition was filed as to 13-month-old S.P.² The Department of Public Social Services (the Department) had received an immediate response referral regarding allegations of physical abuse and general neglect. One of S.P.'s older siblings, I.P.,³ disclosed that Mother and the maternal grandmother would use a belt to hit him and would allow another sibling, J.P., to do the same to him. The children were violent with each other, and the social worker observed several bruises and bite marks all over I.P.'s body. I.P. also reported that he was supposed to stay in his room. He slept on the floor and would wait for the maternal

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Although this appeal involves only S.P., there were two other children named in the petition who have a different father and were placed with him. In addition, two prior dependency cases involving Mother and two other children were terminated when in one case primary physical custody was awarded to the father, while in the other, Mother's parental rights were terminated. In total, Mother had birthed five children as of the time of the April 2010 status review report.

³ Sometimes referred to as T.P.

grandmother to fall asleep before he would use the bathroom. J.P. confirmed that Mother allowed him to “whoop” I.P. if he was bad.

An inspection of the home revealed that it smelled of “stale, dirty home.” There were piles of clothing in every room, dried dog feces on the floor of the room where the boys slept, the bathroom was cluttered and smelled of feces; dirty diapers were piled up and overflowing from a trash can, and the kitchen was very dirty and cluttered with dirty dishes. The water and electricity were working and there was food in the house. Mother admitted using methamphetamines; however, she stated she had not used methamphetamines for two years. S.P. was placed into protective custody. On September 17, 2009, the trial court found probable cause to detain S.P. Visitation and reunification services were ordered.

At the jurisdiction hearing on October 8, 2009, an amended petition was ordered to be filed. The court found that S.P. came within section 300, subdivisions (b) and (g). She was declared a dependent of the court with Mother retaining custody of her upon certain conditions. The maternal grandmother passed away in November 2009.

According to the six-month status review report, Mother was making positive progress; however, the Department wanted more time to ensure Mother’s ability to adequately parent and discipline I.P. and J.P., who were not living with her and S.P. On April 8, 2010, the court continued family maintenance as to S.P. and placed I.P. and J.P. with Mother.

Two months later, Mother’s therapist requested that Mother be referred for psychological testing in order to be assessed for mental illness. Mother had made little to

no progress, and the therapist wanted to determine if Mother was capable of parenting her children in a safe, stable, and nurturing manner. If Mother was determined to have a mental illness, the therapist sought an evaluation as to what strategies could be utilized to help Mother. On July 30, 2010, the trial court granted the request.

Mother's home continued to be marginal; there was no structure or discipline, the house was full of trash and clothing, and the outside appeared unkempt. Despite Mother's participation in individual counseling and in-home parenting classes, she continued to lack the stability needed to provide structure and discipline for the children. Mother suggested that the boys live with their father, and they were moved to father's home on July 24, 2010. After moving in with their father, the behavior of the boys "drastically changed" and they were listening to their father.

Mother brought S.P. to Mother's psychological testing. According to Dr. Edward J. Ryan, after observing for only a few minutes, it was clear that Mother had "no control over [the] child" and the evaluation could not be done. Mother's control over S.P. was described as "weak, at best." After making other arrangements for S.P., the evaluation was conducted. Dr. Ryan reported that Mother's ability to learn from services was extremely limited, her cognitive ability was "not going to ever change," and she was unable to benefit from services. Mother was diagnosed as "Borderline Intellectual functioning"; she has difficulty transferring what she learns from one situation to other situations. Dr. Ryan opined that "[Mother] is functioning below approximately 95% of the general population."

Although Mother had blamed the boys for the mess in the house, after they moved in with their father, she continued to struggle to keep the home clean. She had a hard time controlling S.P.'s behavior, and she was not able to benefit from family services. Nonetheless, the Department was hopeful that an additional six months of services would benefit Mother.

In September 2010, Mother informed the social worker she wanted to move next door “to move away from the problems.” The social worker told her that was not a good idea. On October 13, the court ordered that no one be allowed to live with Mother unless approved by the Department, and the Mother was not to live in any location not approved of by the Department. Nonetheless, on October 19, Mother informed the social worker she had moved into an apartment. The social worker reported that the apartment had “peeling paint coming off the walls, torn and dirty carpet, a damaged window screen, the home was infested with roaches, water spots [were] on the ceilings and holes [were] in the wall.” Mother did not understand that the apartment she moved into was not a good choice.

On November 1, 2010, the Department filed a section 387 petition to remove S.P. from Mother's care. The petition alleged that the previous disposition was not effective in protecting S.P. because Mother had failed to follow through with the court order not move to a location unapproved by the Department. It also alleged that Mother failed to benefit from services, as she continued to place S.P. “at risk of harm due to her poor choices and lack of stability.” S.P. was detained.

Following S.P.'s removal, Mother visited her twice a week for two hours at a time. It was obvious that Mother loved S.P. very much. On December 29, 2010, Mother submitted to a second psychological evaluation. Dr. Kenneth Garrett reported that someone in Mother's situation "should be under someone's supervision or guidance, would need a payee, and would be better off not living alone." The doctor could not recommend that S.P. be returned to Mother; however, he could conceive of the possibility of Mother living with her sister, who wished to become S.P.'s guardian. According to Dr. Garrett, Mother "does not benefit from insight psychotherapy or family training skills as her intellectual skills are quite poor."

On January 18, 2011, the trial court found true the allegation in the amended supplemental section 387 petition. The disposition hearing was continued. At the continued hearing on March 3, services were denied to Mother pursuant to section 361.5, subdivision (b)(2), which provides, in relevant part, that reunification services need not be provided to a parent who is "suffering from a mental disability that . . . renders him or her incapable of utilizing those services." Finding that reunification services were not in the child's best interests, the court set a section 366.26 hearing.

In the section 366.26 report filed on June 13, 2011, the Department recommended termination of parental rights and adoption as the permanent plan for S.P. On May 16, Mother reported that she had gotten married. It was later learned that Mother had married five months after becoming romantically involved with the man. This was her third marriage; the first lasted one month and the second lasted two years. Mother's new husband had a criminal record that included convictions for drug-related offenses and

burglary. They, along with Mother's father-in-law, were living in Mother's two-bedroom home. The father-in-law now owned half of the home; however, there was no disclosure of how much he paid, if any, and to whom.

Placement of S.P. with the maternal aunt was denied. The maternal aunt was not being cooperative and had never completed and returned her packet or submitted to fingerprints. S.P. was placed in an adoptive home on March 24, 2011. She openly showed affection for her prospective adoptive parents by giving them hugs and referring to them as "mom" and "dad." She appeared "playful, loving and intelligent." The prospective adoptive parents demonstrated a willingness to adopt S.P. and to provide her with a permanent home and a lifelong bond.

Mother continued to visit S.P. on a regular basis. Her new husband brought her to the visits but did not participate in them.⁴ S.P. looked forward to the visits, and by April 2011 she ceased crying when they were over. The prospective adoptive parents were willing to continue contact after the adoption was finalized.

On June 23, 2011, Mother filed a section 388 petition on the grounds that her marriage would provide the support necessary to raise S.P. The petition noted that Mother had gotten married in May 2011, and her husband worked in construction and had completed study in audio technology. He was willing to become S.P.'s father through adoption, and the father-in-law had a monthly income of \$2,114 per month from social security, investments, and a union pension. In response, the Department noted

⁴ At a later hearing, the husband offered stipulated testimony that he was not allowed to have visits with S.P.

there was trash strewn around the yard, which had a foul odor, and there were large piles of wood and metal everywhere, and many trash items similar to those observed the prior year were still in the yard. The Department expressed concern that Mother had never mentioned her husband prior to the marriage, and the marriage was too recent for the Department to assess its stability. Also, there was no disclosure about how much the father-in-law paid for his half interest in the home. During the hearing, Mother provided stipulated testimony that her sister had sold her half interest in the home to Mother's father-in-law. Mother did not receive any proceeds from the sale.

After hearing argument from counsel, the court observed that Mother's current changed circumstances were not positive; rather, they showed Mother's continued pattern of entering into relationships with men who "would exploit her for sexual purposes and perhaps in this case for some financial gain as well" The court found Mother to be "completely compulsive [with] no ability to judge the character of other people with whom she would move in." Thus, finding no positive change in circumstances, and that the request was not in S.P.'s best interests, the court denied Mother's section 388 petition. Rejecting Mother's argument that the parent-child bond warranted the preservation of her parental rights, the court terminated Mother's parental rights. She appeals.

II. SECTION 388 PETITION

Mother filed a section 388 petition because she wanted to change the court's prior order denying her reunification services based on her psychological evaluations. She contends the court erred in denying her petition because her reunification with her sons in 2010 showed she had benefitted from the services. Furthermore, she argues that her

marriage established the requisite change in circumstances, and the court's characterization of the change as negative was based on speculation. Finally, she claims that resuming reunification services was in S.P.'s best interests.

A parent who seeks a modification of an order of the juvenile court may file a petition under section 388. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308-309.) To succeed in such a petition, the parent must establish both that circumstances have changed and that the modification of the earlier order would be in the child's best interests. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526.) We review the juvenile court's ruling on the petition under the deferential abuse of discretion standard. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.)

Mother argues she showed changed circumstances because there are references to her benefiting from the services, and she had gotten married and had support from her husband and father-in-law. While Mother describes her circumstances as having changed for the better, the Department points out that Mother's home remained in a similar condition as it was a year earlier. The yard was full of discarded items and had a foul odor, and there was no progress in cleaning it up. Further, Mother and her husband "strongly suggested" that they meet with the social worker outside the home because the home was full of boxes that contained the husband's belongings. Thus, the social worker was unable to see the inside of the home. Mother's husband had a criminal record, Mother allowed her father-in-law of only a few months to purchase a half interest in her home, and Mother was unaware of the amount, if any, her father-in-law paid for the half interest. According to the Dr. Garrett, who evaluated Mother on December 29, 2010,

Mother should be under someone's supervision or guidance, would "need a payee," and would be better off not living alone.

Although Mother claims she "successfully reunified with" her sons, the record shows that three months later, at her suggestion, the boys went to live with their father because she was unable to control them. While the boys were living with Mother, her therapist noted she was making little or no progress. Dr. Garrett opined that Mother "does not benefit from insight psychotherapy or family training skills as her intellectual skills are quite poor." While the doctor had suggested that Mother live with a family member, such as her sister, who would be S.P.'s guardian, the doctor specifically stated that Mother was not to be S.P.'s guardian. Other than marrying her husband, Mother took no action to have the Department approve him as a possible guardian for S.P. and there is nothing in the record to recommend him for such position.

Based on the record before this court, the trial court did not abuse its discretion in concluding that Mother failed to meet her burden of establishing changed circumstances. Because we find support for the juvenile court's conclusion that Mother failed to establish the first prong of changed circumstances, we need not address her arguments as to the second prong of the best interest of the child.

III. BENEFICIAL PARENTAL RELATIONSHIP

At a section 366.26 hearing, the court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) "Once the court determines the child is likely to be adopted, the burden shifts

to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). [Citations.]” (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.)

The parental benefit exception is set forth in section 366.26, subdivision (c)(1)(B)(i). (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 297.) The exception applies when two conditions are satisfied: (1) “the parent has maintained regular visitation and contact with the child,” and (2) “the child would benefit from continuing the relationship.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466; see § 366.26, subd. (c)(1)(B)(i).) Here, the Department does not dispute the first condition; Mother maintained regular visits with S.P. Thus, we are concerned in this case with the second requirement.

The parent has the burden of establishing the applicability of the exception. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) To satisfy this burden, the parent must show that his or her relationship with the child “‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. . . . If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’ [Citation.] [¶] The parent must do more than demonstrate ‘frequent and loving contact[,]’ [citation] an emotional bond with the child, or that parent and child find their visits pleasant. [Citation.] Instead, the parent must show that he or she occupies a ‘parental role’ in the child’s life. [Citations.]” (*Id.* at p. 827.)

“‘The balancing of competing considerations must be performed on a case-by-case basis and take into account many variables, including the age of the child, the portion of the child’s life spent in the parent’s custody, the “positive” or “negative” effect of interaction between parent and child, and the child’s particular needs. [Citation.] When the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent/child relationship, the court should order adoption.’ [Citation.]” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349-1350.)

There must be a “‘compelling reason’” for applying the parental benefit exception. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1349; see also § 366.26, subd.

(c)(1)(B)(i).) This is a “quintessentially discretionary determination.” (*In re Jasmine D.*, *supra*, at p. 1351.) Broad deference must be shown to the juvenile’s court’s discretionary determination, and this court will interfere only if, under all the evidence presented, viewed in the light most favorable to the juvenile court’s determination, we conclude no judge could reasonably have made the determination. (*Ibid.*)

Here, Mother’s argument that she established the applicability of the parental benefit exception to adoption is based essentially on the following: S.P. looked forward to seeing Mother, and for much of the time, cried when the visits ended; S.P. had lived with Mother for 27 of her 35 months, nearly 80 percent; and termination of parental rights would limit S.P.’s contact with her other siblings. In response, the Department points out that S.P. was “extremely bonded” to her prospective adoptive parents who were meeting her basic needs and providing constant care and protection. The prospective adoptive parents live in a three bedroom “clean and child friendly” home

with their adopted three-year-old daughter. Additionally, we note that although S.P. initially cried when her visits with Mother ended, by April 2011 the crying stopped. The prospective adoptive parents were open to continuing contact between S.P., on the one hand, and Mother and her other children, on the other. And, most importantly, in December 2010 Dr. Garrett specifically stated that Mother was not to be S.P.'s guardian.

Given the above, we cannot conclude that the juvenile court erred in finding that Mother failed to show that S.P. would benefit from continuing the relationship.

IV. DISPOSITION

The order terminating parental rights is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

MILLER

J.